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Supreme Court of the United States

OCTOBER TERM, 1967.

No. 1239

CITIZENS BANK OF HATTIESBURG; M. D. BRETT and J. W. MANGUM,

Petitioners,

versus

WILLIAM B. CAMP, COMPTROLLER OF THE CURRENCY OF THE UNITED STATES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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TABLE OF CONTENTS.

	Page
I. JURISDICTION	2
II. OPINIONS BELOW	2
III. STATEMENT OF GROUNDS FOR JURISDICTION	3
IV. QUESTIONS PRESENTED	4
V. CONSTITUTIONAL PROVISIONS, STATUTES AND RULES	5
VI. STATEMENT OF CASE	7
Federal Jurisdiction	8
On Question Of Standing In Court	9
On Right Of Judicial Review Of Action Of Comptroller	10
Decisions In Above Cause In Conflict With Decisions Of Other Court Of Appeals	13
On Trial De Novo	14
Application Of Federal Administrative Procedure Act	15
VII. REASONS RELIED ON FOR GRANTING WRIT	18
CONCLUSION	24
PROOF OF SERVICE	25

TABLE OF CONTENTS—(Continued):

Page

APPENDICES:

APPENDIX "A"—Opinion Of The Court ... 27

APPENDIX "B"—Final Judgment 36

APPENDIX "C"—Opinion Dated Dec. 4, 1967 37

APPENDIX "D"—Judgment 39

APPENDIX "E"—On Petition For Rehearing En Banc 41

APPENDIX "F"—12 U.S.C.A., Sections 26 And 27 42

APPENDIX "G"—Section 36 44

APPENDIX "H"—Section 36(c); 5 U.S.C.A. Sections 554 And 556 46

APPENDIX "I"—5 U.S.C.A., Sections 702 And 703 52

APPENDIX "J"—Excerpts From Constitution Of U.S. 53

TABLE OF AUTHORITIES.

Page

Cases:

Alabama Power Co. v. Ickes, 302 U.S. 464 9

American Bank and Trust Company v. Saxon, (CCA 6, 1965) 248 F.Supp. 324, 373 F.2d 283 11

Abbot Laboratories v. Gardner, 387 U.S. 136, 18 L.Ed.2d 681, 87 S.Ct. 1507 12

Bank of Dearborn v. Saxon, 377 F.2d 496.....12, 13, 16, 17, 19, 20

Denver & Rio Grande Western Railroad Co. v. The United States, 387 U.S. 485, 18 L.Ed.2d 905, 87 S.Ct. 1754 12

Farris v. Indian Hills National Bank, (Neb.), 244 F.Supp. 594 11

First National Bank of Logan, Utah v. Walker Bank & Trust Company, 385 U.S. 252, 17 L.Ed.2d 343, 87 S.Ct. 492 .....13, 23

First National Bank of Smithfield, N. C. v. Saxon, (CCA 4th) 352 F.2d 267..10, 12, 14, 19, 20

Gardner v. Toilet Goods Association, 387 U.S. 167, 18 L.Ed.2d 704, 87 S.Ct. 998 13

Hardin v. Kentucky Utilities Company, 88 S.Ct. 651 .....10, 12

Jackson v. First National Bank of Valdosta, 349 F.2d 71 20

Kansas City Power & Light Co. v. McKay, 225 F.2d 925 (C.A.D.C.), certiorari denied, 350 U.S. 884 9

Peoples Bank of Trenton v. Saxon, (CCA 6th) 373 F.2d 185, 188-189 .....12, 15, 20

Penn-Central Merger and N & W Inclusion Cases, 88 S.Ct. 602 12

Riss & Co., Inc. v. United States, 341 U.S. 907 .. 18

TABLE OF AUTHORITIES—(Continued):

Page

Cases—(Continued):

Rural Electrification Administration v. Central Louisiana Elec. Co., 354 F.2d 859 (C.A. 5), certiorari denied, 385 U.S. 815 9

Tennessee Power Co. v. Tennessee Valley Authority, 306 U.S. 118, 137-41 9

Udall v. Federal Power Commission, 387 U.S. 428, 18 L.Ed.2d 869, 87 S.Ct. 1712 .....12, 19

Union Savings Bank v. Camp, (CCA D.C.) 335 F.2d 718 20

United States v. First City National Bank of Houston and United States v. Provident National Bank (consolidated), 386 U.S. 361 20

Webster Groves Trust Co. v. Saxon, (CCA 8th) 370 F.2d 381 .....10, 11, 20

Whitney National Bank v. Bank of New Orleans, 379 U.S. 411, 85 S.Ct. 551, 13 L.Ed.2d 386 21

Wong Yang Sung v. McGrath, 339 U.S. 33, 1950 17

Other:

5 U.S.C.A.:

Section 509 11

Section 551, et seq. 4

Section 701, et seq. 4, 16, 18

Section 1009 .....11, 17

12 U.S.C.A.:

Sections 26 and 27 ..... 4, 6

Section 36(c) 4, 6

28 U.S.C., Section 1254 (1) 2

Administrative Procedure Act 17

TABLE OF AUTHORITIES—(Continued):

Page

Other—(Continued):
Federal Rules of Civil Procedure:
Rule 56(c) 6
Supreme Court Rule:
19(1)(b) 2
23(b) 3
United States Code Annotated:
Title 5, Section 551, et seq. 8
Title 5, Section 701, et seq. 8
Title 12, Section 27 8
Title 28, Sections 1331, 1348 and 1394 8

SUPREME COURT OF THE UNITED STATES
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No. .....

CITIZENS BANK OF HATTIESBURG; M. D. BRETT and J. W. MANGUM,

Petitioners,

versus

WILLIAM B. CAMP, COMPTROLLER OF THE CURRENCY OF THE UNITED STATES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Your petitioners, Citizens Bank of Hattiesburg, Mississippi, a Mississippi banking corporation, and M. D. Brett and J. W. Mangum, stockholders of the First National Bank of Hattiesburg, Mississippi, a national banking corporation, respectfully pray that a writ of certiorari be issued to review the decisions of the United States Court of Appeals for the Fifth Circuit entered on December 4, 1967, on direct appeal and on January 18, 1968, on petition for rehearing en banc or for rehearing, which affirmed judgment of the United States District Court for the

Hattiesburg Division of the Southern District of Mississippi, and which judgment held that the complaint was without merit and should be dismissed.

I.

JURISDICTION.

Jurisdiction to review this case on petition for writ of certiorari is conferred upon this Court by 28 U.S.C., Section 1254 (1), and Supreme Court Rule 19(1)(b).

II.

OPINIONS BELOW.

The opinion of the United States District Court for the Southern District of Mississippi (Harold Cox, J.) (R. 791) does not appear in the official reporter system but copy thereof is attached hereto as Appendix "A"; and the judgment thereon is printed in the record (R. 801) and copy thereof is attached hereto as Appendix "B".

The opinion of the Court of Appeals for the Fifth Circuit (Rives, J.) does not appear in the official reporter system but copy thereof is attached hereto as Appendix "C"; and copy of the judgment of the Court of Appeals for the Fifth Circuit is attached hereto as Appendix "D" and copy of the order of the Court of Appeals denying petition for rehearing en banc or for rehearing is attached hereto as Appendix "E".

III.

STATEMENT OF GROUNDS FOR JURISDICTION.

The grounds on which jurisdiction of this Court is invoked are:

(a) That the Circuit Court of Appeals for the Fifth Circuit has rendered a decision in conflict with the decision of another Court of Appeals on the same subject matter; and (b) said Court has decided an important question of federal law which has not been, but which should be, settled by this court; and (c) said Court has rendered its opinion in conflict with applicable decisions of this Court; and (d) said Circuit Court of Appeals has departed from the accepted and usual course of judicial proceedings and has followed the United States District Court in the cause to justify and require the exercise of the power of supervision of this Court; and pursuant to Supreme Court Rule 23(b), petitioners further say:

(i) The judgment of the United States Court of Appeals for the Fifth Circuit sought to be reviewed was dated and entered December 4, 1967.

(ii) Said Court entered order respecting a rehearing dated and filed January 18, 1968; and said Court of Appeals, on application therefor, entered order to stay the mandate pending the filing of this petition for writ of certiorari for a period of 60 days from January 28, 1968, and the stay will continue thereafter provided this petition for writ of certiorari is filed

within said 60 day period and a certificate of the Clerk of the Supreme Court of the United States has been filed with the Clerk of the United States Court of Appeals for the Fifth Circuit.

(iii) The statutes primarily involved are the provisions of the National Bank Act authorizing the Comptroller of the Currency to issue certificates permitting the opening for business of national banks (12 U.S.C.A., §§ 26 and 27) copy thereof being attached hereto as Appendix "F"; the provision of the National Bank Act regulating the establishment of branches by national banks (12 U.S.C.A., § 36(c)), copy thereof being attached hereto as Appendix "G"; certain sections of the Federal Administrative Procedure Act (5 U.S.C.A., § 551, et seq.), copy of Section 554 and 556 thereof being attached hereto as Appendix "H"; and provisions for judicial review (5 U.S.C.A., § 701, et seq.), copy of applicable § 702 and § 703 being attached hereto as Appendix "I".

IV.

QUESTIONS PRESENTED.

The questions presented by this petition are:

1. Did the Citizens Bank of Hattiesburg and M. D. Brett and J. W. Mangum, stockholders of the First National Bank of Hattiesburg, identifying two competing banks, have court standing to challenge the chartering of a new national bank by the Comptroller

of the Currency in the City of Hattiesburg, Mississippi?

2. Do the courts have right to review the actions of the Comptroller of the Currency in chartering new national banks, and, if so, what is the extent of such review?

3. Do existing conflicts and controversies of the District Courts and of the Circuit Courts of Appeals of the United States and with this Court suggest public need for review and announcement of controlling principles of law relating to chartering of new national banks in the United States?

4. Under the National Bank Act, do competing banks have right of trial de novo before United States District Courts challenging decisions of the Comptroller of the Currency relating to granting of new national bank charters?

5. Does the Federal Administrative Procedure Act of the United States apply to the Comptroller of the Currency?

V.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES.

The constitutional provisions are: The Fifth Amendment to the Constitution of the United States respecting due process affecting property rights; the Four-

teenth Amendment to said Constitution respecting due process and equal protection of the law, pertinent parts thereof being set forth in Appendix "J" attached hereto; Acts of Congress being the National Bank Act, 12 U.S.C.A., §§ 26 and 27 and 36(c), and the case also involves the application of the Federal Administrative Procedure Act (copies of these statutes are attached hereto as Appendix "H" and "I").

Also involved is Rule 56(c) of Federal Rules of Civil Procedure, which reads as follows:

> "(c) Motion (for summary judgment) and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages."

VI.

STATEMENT OF CASE.

The Citizens Bank of Hattiesburg is a Mississippi banking corporation located in the City of Hattiesburg, Mississippi. M. D. Brett and J. W. Mangum are stockholders of the First National Bank of Hattiesburg, a national banking corporation. The petitioner bank and the First National Bank of Hattiesburg were the only banks in Hattiesburg, Mississippi, prior to the advent of the so-called "Southern National Bank." These two banks each had two branch banks within the corporate limits of Hattiesburg, Mississippi, and each of them had one additional branch in the unincorporated village of Petal, Mississippi, which adjoins the corporate limits of Hattiesburg, Mississippi. On January 7, 1965, application was made for the new charter and a national bank examiner covering the area was assigned to investigate, with result that he recommended the disapproval of the application. The Comptroller of the Currency failed to follow the Federal Administrative Procedure Act. He failed to recognize the laws of the United States and the State of Mississippi relating to competitive equality between state and national banks. He refused to apply the principles of due process and, we say, acted arbitrarily or otherwise illegally in attempting to grant the new charter and that his acts were capricious, arbitrary and illegal; but the Comptroller did in fact issue charter for the establishment of the new bank on August 18, 1965, after the suit here had been filed on June 8, 1965.

The complaint of petitioners filed in the United States District Court for the Hattiesburg Division of the Southern District of Mississippi was for declaratory judgment. The defendant, James J. Saxon, Comptroller of the Currency, filed motion to dismiss the complaint or in lieu thereof for summary judgment. The judgment of the court was really summary in nature and partially, if not totally, influenced by motion for summary judgment.

The only opportunity for hearing prior to issuing charter was in the office of the Deputy Comptroller of the Currency in the afternoon of April 16, 1965 (Good Friday); and that hearing was so limited that the attorney for the Deputy Comptroller announced in the beginning that each side would have 15 minutes for presentation of their respective positions with no right of cross-examination; and the so-called hearing was adversary but with no notice thereof to petitioners or their representatives or attorneys. The chief counsel for the Comptroller advised that it was not the practice of the Comptroller's office to "write" "opinions" covering disposition of application for new national banks.

FEDERAL JURISDICTION.

There is here involved a review of the judgment of the Federal District Court and the Court of Appeals. The federal jurisdiction is based upon Sections 1331, 1348 and 1394 of Title 28, Sections 551, et seq., and Sections 701, et seq. of Title 5, and Section 27 of Title

12 and other sections of the chapter of said Title 12, all of the United States Code Annotated.

ON QUESTION OF STANDING IN COURT.

The Comptroller of the Currency claims that neither the Citizens Bank of Hattiesburg nor M. D. Brett and J. W. Mangum, stockholders of the First National Bank of Hattiesburg, had standing to challenge the chartering of a new national bank. The Circuit Court of Appeals refused to pass upon this question with statement that, "We need not decide the question of whether a competing bank and stockholders of a second competing bank have standing to challenge the chartering of a new national bank for, assuming such standing arguendo, we agree with the district court that the complaint is without merit." Attorneys for the Comptroller cited authorities to support this theory: *Alabama Power Co. v. Ickes*, 302 U.S. 464; *Tennessee Power Co. v. Tennessee Valley Authority*, 306 U.S. 118, 137-41; *Rural Electrification Administration v. Central Louisiana Elec. Co.*, 354 F.2d 859 (C.A. 5), certiorari denied, 385 U.S. 815; *Kansas City Power & Light Co. v. McKay*, 225 F.2d 925 (C.A.D.C.), certiorari denied, 350 U.S. 884.

The decisions in conflict with that contended for the Comptroller of the Currency appear from other Circuits, including the Fourth and Eighth Circuits. We furnish short quotes from each of these jurisdictions.

> "We hold, too, that the bank's competitors have standing to seek the review, not because of the

potential sharpening of competition, but because they have an immediate concern, apart from the public generally, to prevent an approval contrary to law. Thus they are 'interested' within the purpose of § 1004(b), APA." *First National Bank of Smithfield, N. C. v. Saxon,* (CCA 4th) 352 F.2d 267.

"We believe that competing banks, as interested parties, have a right to challenge illegal acts of the Comptroller and that the Comptroller's discretionary acts are not immunized from judicial review." *Webster Groves Trust Co. v. Saxon,* (CCA 8th) 370 F.2d 381.

The Comptroller of Currency, in issuing a certificate to a new national bank, should make a determination of public convenience and necessity. This being true, the public and competing banks have a particular interest in the findings of the Comptroller of Currency on the question of public convenience and necessity so that the banking structure in the community may remain sound. *Hardin v. Kentucky Utilities Company,* 88 S.Ct. 651.

ON RIGHT OF JUDICIAL REVIEW OF ACTION OF COMPTROLLER.

The case of *Webster Groves Trust Co. v. Saxon, supra,* is authority for right to review actions of the Comptroller. In that case from the Eighth Circuit the court stated:

> "Therefore, we do not believe the courts are powerless to protect the public from unconstitutional, illegal, or otherwise arbitrary activities of administrative officials. The Comptroller is free to exercise his discretion in the granting of charters, free from any review on the merits of his action. However, if the Comptroller acts in excess or abuse of his legal authority, to this extent his actions are subject to judicial review, with the burden of proof resting on the party seeking the review." *Webster Groves Trust Co. v. Saxon, supra.* See also *Farris v. Indian Hills National Bank*, (Neb.), 244 F.Supp. 594.

After quoting from 5 U.S.C.A., § 1009 of the Administrative Procedure Act, now 5 U.S.C.A., § 509, the District Court for the Western Division of Michigan said of this:

> "The Comptroller's decisions are therefore reviewable. Commonwealth Natl. Bank v. Saxon, 310 F.2d 224 (CCA 6, 1962); Commercial Security Bank v. Saxon, 236 F.Supp. 457 (D.D.C. 1964)." *American Bank and Trust Company v. Saxon* (CCA 6, 1965) 248 F.Supp. 324, 373 F.2d 283 (Reversed on other grounds).

The Circuit Court of Appeals for the Sixth Circuit said of this:

> "The District Judge's review of the Comptroller's action was made under the standard of the

> Administrative Procedure Act, 5 U.S.C., Section 1009. We agree that this record discloses 'an abuse of discretion' in defendant Comptroller's grant of the disputed certificate of authority to defendant Manufacturers National Bank of Detroit." *Bank of Dearborn v. Saxon*, 377 F.2d 496. See also *First National Bank of Smithfield, N.C. v. Saxon, supra.*

The opinion of the Circuit Court of Appeals in this cause held that, "The court may not substitute its judgment for that of the Comptroller"; but in the case of *Peoples Bank of Trenton v. Saxon*, (CCA 6th) 373 F.2d 185, 188-189, the court said:

> "It was the District Court's mandatory duty to conduct an adversary hearing and to determine upon the whole record in a de novo proceeding whether the Comptroller's decision was arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." *Peoples Bank of Trenton v. Saxon, supra.*

On this same point, it is well to consider the recent cases of this Court affording a party a judicial review where he would be adversely affected by an administrative ruling. *Hardin v. Kentucky Utilities Company, supra; Penn-Central Merger and N & W Inclusion Cases*, 88 S.Ct. 602; *Denver & Rio Grande Western Railroad Co. v. The United States*, 387 U.S. 485, 18 L.Ed.2d 905, 87 S.Ct. 1754; *Udall v. Federal Power Commission*, 387 U.S. 428, 18 L.Ed.2d 869, 87 S.Ct. 1712; *Abbott Laboratories v. Gardner*, 387 U.S.

136, 18 L.Ed.2d 681, 87 S.Ct. 1507, and *Gardner v. Toilet Goods Association*, 387 U.S. 167, 18 L.Ed.2d 704, 87 S.Ct. 998.

DECISIONS IN ABOVE CAUSE IN CONFLICT WITH DECISIONS OF OTHER COURT OF APPEALS.

In the case of *Bank of Dearborn v. Saxon, supra*, the Court of Appeals for the Sixth Circuit affirmed the District Court judgment, and the District Court had said of this that:

> "If, indeed, it were true that his admittedly broad discretion were combined with his doctrine of unreviewability of the exercise of his discretion, plus the complete secrecy of his files relating thereto, a constitutional question of the first magnitude would be presented, since the possessor of such powers would be unassailable in any court by any process. We are aware of no sueh sanctuary in American constitutional law, nor do we believe that the Congress ever sought to confer it." *Bank of Dearborn v. Saxon*, 244 F.Supp. 394, 401.

There is also conflict with the Supreme Court of the United States if the opinion of the Circuit Court of Appeals in this cause is permitted to stand. We cite the case of *First National Bank of Logan, Utah v. Walker Bank & Trust Company*, 385 U.S. 252, 17 L.Ed.2d 343, 87 S.Ct. 492.

ON TRIAL DE NOVO.

The record in the trial court discloses that no evidence on the issues raised were admitted. The court only admitted proffers (R. 716). In this cause, the trial judge stated that he did not think the burden was on the plaintiff "to dig up a record or go try to gouge out of this Comptroller evidence that he may or not be willing to divulge." (R. 716.) The court further stated that if he heard the evidence, he might "conclude from" the evidence that applicants were not "entitled to a charter." (R. 726.) The trial court further stated that we were not permitted to have a factual hearing (R. 751). The Circuit Court of Appeals for the Fifth Circuit in this case held that, "The action of the Comptroller is not subject to review by trial de novo. The Court may not substitute its judgment for that of the Comptroller." This is contrary to a decision of the Fourth Circuit as follows:

> "On the remand of this case, the plaintiff may adduce evidence demonstrating the impermissibility of the Comptroller's approval of a branch bank at Smithfield. Testimony to the contrary will be receivable from the Comptroller. The Court will then find the facts. Thereon, it will judge de novo the validity, in fact and in law, of the Comptroller's final action." *First National Bank of Smithfield, N. C. v. Saxon, supra.*

The Circuit Court of Appeals for the Sixth Circuit says of this:

> "The Comptroller's decision was arrived at without an adversary hearing, consequently there is no transcript or other record which reveals the findings and conclusions of the Comptroller incident to his decision. At the trial the Comptroller successfully urged the 'executive privilege,' thus barring disclosure of much of the evidence and the findings upon which he arrived at his judgment.
>
> "It is our opinion that the District Court proceeded according to law and that it would have been erroneous for the Court to have based its judgment merely upon review and analysis of the tenuous evidence disclosed by the Comptroller's file. It was the District Court's mandatory duty to conduct an adversary hearing and to determine upon the whole record in a de novo proceeding whether the Comptroller's decision was arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." *Peoples Bank of Trenton v. Saxon, supra.*

APPLICATION OF FEDERAL ADMINISTRATIVE PROCEDURE ACT.

The Comptroller of the Currency did not comply with the Federal Administrative Procedure Act and we contend and believe that therein the Comptroller

first defaulted and failed. His refusal to follow the Act was unlawful, and that which he failed to do was by him arbitrary and capricious. If the Act has no application, the principles therein contained control to make possible administrative due process. Reference is made to Sections 702 and 703 of Title 5, U.S.C.A., and in the latter section there appears the alternative approach to require adequate judicial review.

> "The Comptroller, it is true, has a broad discretion with respect to the matters committed to his charge, including moves of branch banks. In this regard, he urges that the exercise of his discretion under these facts is not subject to judicial review, nor, in fact, are his files subject to scrutiny. Actually what he is arguing for is the complete invulnerability of his decisions. If, indeed, it were true that his admittedly broad discretion were combined with his doctrine of unreviewability of the exercise of his discretion, plus the complete secrecy of his files relating thereto, a constitutional question of the first magnitude would be presented, since the possessor of such powers would be unassailable in any court by any process. We are aware of no such sanctuary in American constitutional law, nor do we believe that the Congress ever sought to confer it." *Bank of Dearborn v. Saxon, supra* (District Court).

The Federal Administrative Procedure Act was in existence when the above opinion was written and when the case now before the Court was decided was 5 U.S.C.A., Section 1001, et seq. The new sections in said Code bear numbers 501, et seq. and these sections relate to judicial review. The *Bank of Dearborn* case was affirmed by the Circuit Court of Appeals for the Sixth Circuit and therein appears the following:

> "For the reasons outlined above and those set forth in more detail in the opinion of the District Court, Bank of Dearborn v. Saxon, supra, we affirm the District Court decree." *Bank of Dearborn v. Saxon, supra.*

This Court, in the case of *Wong Yang Sung v. McGrath*, 339 U.S. 33, in 1950, decided that deportation hearings were subject to the Administrative Procedure Act, even though the statute covering deportation did not require a hearing, on the ground that constitutional due process did require one. Since the granting of a charter to a new national bank by the Comptroller of Currency must, of necessity, be based upon a determination by the Comptroller that there is a convenience and necessity in the community for a new bank, it is necessary that he hold a hearing under the Administrative Procedure Act. In the rules published by the Comptroller, Section 4.2, "Organization of National Banks" (b)(3), in dealing with what has to be considered, it is provided:

> "The convenience and needs of the community to be served by the proposed bank."

In the case of *Riss & Co., Inc. v. United States,* 341 U.S. 907, where it was urged that the Motor Carrier's Act did not specifically require a hearing, this Court, nevertheless, held that it was necessary for the Interstate Commerce Commission to hold a hearing under the Administrative Procedure Act and reversed the ruling of the Lower Court.

VII.

REASONS RELIED ON FOR GRANTING WRIT.

The decision below permitted the granting of a certificate or charter for new bank by the Comptroller of the Currency upon theory that the District Court properly held that the court may not substitute its judgment for that of the Comptroller and that there was no right of trial de novo and that the Federal Administrative Procedure Act had no place in the controversy and that no formal adversary hearing was necessary or proper before or with the Comptroller, and that no testimony would be admitted in trial court to disclose that the Comptroller acted arbitrarily or otherwise illegally, contrary to right of judicial review (5 U.S.C.A., § 701 et seq.).

No consideration was given by the Court to the question of due process or the property rights of the complaining parties. Neither was there given consideration to the confusion countrywide created through acts of the Comptroller in field of granting charters to new banks or issuing certificates for branch banks.

This case presents important questions, not heretofore decided by this Court, relating to the standing of petitioners to challenge the chartering of a new bank; the reviewability of the action of the Comptroller; the conflict of decisions in the area or field involved between the opinion of the Circuit Court of Appeals for the Fifth Circuit and of other circuits; the question of whether or not a competing bank such as petitioner is entitled to a trial de novo; whether or not the Federal Administrative Procedure Act should apply in whole or in part, whether or not there exists right of judicial review, and whether or not this whole area of concern is of such importance because of controversy throughout the country in field of banks and banking to call for decision or direction in this area of public concern by the Supreme Court of the United States.

(1) The Circuit Court of Appeals was unwilling to decide the question of whether a competing bank and the stockholders of a second competing bank "have standing to challenge the chartering of a new national bank." Attorneys for the Comptroller had argued that no such right existed. The authorities identified in the foregoing Statement of Case and other authorities require the conclusion that the decisions of the several circuits are in discord; but the majority view and better-reasoned cases support the right in a competing bank to challenge the chartering of a new bank. *First National Bank of Smithfield, N. C. v. Saxon, supra; Webster Groves Trust Co. v. Saxon, supra; Bank of Dearborn v. Saxon, supra;*

Peoples Bank of Trenton v. Saxon, supra, and *Jackson v. First National Bank of Valdosta,* 349 F.2d 71.

(2) The Circuit Court of Appeals for the Fifth Circuit in this cause held that, "The action of the Comptroller is not subject to review by trial de novo. The Court may not substitute its judgment for that of the Comptroller." This opinion is contrary to the opinion in the case of *Webster Groves Trust Co. v. Saxon, supra,* wherein it was held that the administrative agency was not beyond court review and that the court should hear and consider evidence supporting charges of arbitrary or capricious or otherwise unlawful acts of the Comptroller. Other cases to the same effect are: *Peoples Bank of Trenton v. Saxon, supra; First National Bank of Smithfield, N. C. v. Saxon, supra; Peoples Bank of Trenton v. Saxon, supra; Bank of Dearborn v. Saxon, supra; Union Savings Bank v. Camp,* (CCA D.C.) 335 F.2d 718 (subsequent trial not yet in Reporter System); *United States v. First City National Bank of Houston* and *United States v. Provident National Bank* (consolidated), 386 U.S. 361.

> "But, as stated by the Solicitor General, 'The National Bank Act . . . makes no provision for an administrative hearing or for judicial review, and the Comptroller's decisions are made informally, without an administrative record.' The courts, however, have held that judicial cognizance of a controversy with the Comptroller may be taken and judicial power exercised to keep the Comptroller within statutory bounds. Camden

Trust Co. v. Gidney, 112 App DC 197, 301 F2d 521; Union Savings Bank v. Saxon, 118 App DC 296, 298, 335 F2d 718, 720, and cases cited. That conclusion is consistent with our holding in Columbia Broadcasting System, Inc. v. United States, 316 US 407, 423-424, 86 L.ed 1563, 1574, 62 S.Ct. 1194, that, absent a congressional design to bar all judicial review (Switchmen's Union v. National Mediation Board, 320 US 297, 88 L ed 61, 64 S Ct 95), injunctive relief is available where administrative remedies are either inapplicable or inadequate. This rule keeps the Comptroller from being a free-wheeling agency dispensing federal favors; and it gives some assurance that he will render principled decisions within the rule of law laid down by Congress." *Whitney National Bank v. Bank of New Orleans,* 379 U.S. 411, 85 S.Ct. 551, 13 L.Ed.2d 386.

(3) The conflict of decisions identified with the conduct of the Comptroller are multiple in many areas. In the Statement of Case above we have given citations of confusing decisions respecting the standing of a competitive bank to challenge that done by the Comptroller of the Currency in establishing a new bank, and conflicts on right of review of actions of the Comptroller, and conflicts in decisions of the Supreme Court of the United States with a number of Circuit Courts which require the conclusion that there are many areas relating to banks and banking which are not understood by some courts and not understood by the litigants. This has resulted in great con-

fusion within the field of banks and banking. There is conflict between the opinion in the case here presented with other courts of some of the Circuits respecting right of trial de novo and right of review. To avoid duplication and repetition, we refer to all those cases and make them a part of this segment of this petition as much so as if again copied herein.

(4) There arises the question of whether or not the time has not arrived when some positive statement be made in the field of direction of the Comptroller of the Currency and his staff to comply with and conform to the Federal Administrative Procedure Act as far as same may be applicable to avoid further controversy and conflict and to stabilize this field of banks and banking. Existing public confusion results in public concern and need for expression from the Supreme Court of the United States in this area and in area of right of judicial review.

We would fail in proper perspective on the general issues here involved if we did not mention the question of competitive equality. Such has been ignored by the trial court. We were unable to furnish proof in this particular area. The court held that the action was not an adversary proceeding, not a plenary suit, and "it will not be that kind of a proceeding here." (R. 716.) The trial judge stated that it had "no power to charter national banks," but that it "might conclude from your evidence they wasn't entitled to a charter." (R. 726.) In connection with depositions presented to the court, the judge stated that, "I don't

know who advised him not to answer, but it was not a proper piece of advice." (R. 761.) We have thought that we were entitled to furnish evidence in the whole field and particularly in the field of competitive equality.

> "As a result of the passage of this act, the national bank act has been so amended that national banks are able to meet the needs of modern industry and commerce and competitive equality has been established among all member banks of the Federal Reserve System. * * *
>
> "The Comptroller argues that Utah's statute 'expressly authorizes' state banks to have branches in their home municipalities. He maintains that the restriction, in the subsequent paragraph of the statute limiting branching solely to the taking over of an existing bank, is not applicable to national banks. It is a strange argument that permits one to pick and choose what portion of the law binds him. Indeed, it would fly in the face of the legislative history not to hold that national branch banking is limited to those States the law of which permits it, and even there 'only to the extent that state laws permit branch banking.' " *First National Bank of Logan, Utah v. Walker Bank & Trust Company, supra.*

CONCLUSION.

The case presents important and substantial questions of the administration and application of the National Bank Act and of the rights of a competing bank to go into court and and seek the review of the actions of the Comptroller of the Currency considered and charged to be arbitrary and capricious, and the question of whether or not the Federal Administrative Procedure Act has a place in the federal system of banks and banking in the control of that done by the Comptroller.

Certiorari should be granted.

Respectfully submitted,

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PROOF OF SERVICE.

I, M. M. Roberts, of attorneys for petitioners and being a member of the Bar of the Supreme Court of the United States, hereby certify that on this day I served copies of the foregoing Petition for Writ of Certiorari upon Honorable Carl Eardley, Acting Assistant Attorney General, Civil Division, United States Department of Justice, Washington, D. C.; Honorable Alan A. Rosenthal and Honorable Walter H. Fleischer, Attorneys, United States Department of Justice, Washington, D. C.; Honorable Robert E. Hauberg, United States Attorney, Jackson, Mississippi, counsel for respondent, and Honorable Francis T. Zachary, Attorney for Southern National Bank, Hattiesburg, Mississippi, dated this .... day of March, A. D., 1968.

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